11 March 2002

Docket Management System
US Department of Transportation
Room Plaza 401
400 Seventh Street, SW
Washington, DC 20590

RE: Docket No. FAA-2001-10999
Criminal History Records Checks

Docket Management;

Thank you for the opportunity to address the issues raised in your request for comments related to criminal history records checks. The Aviation Policy Institute is pleased to submit the following comments. While we generally support this approach to security enhancement, we feel as though some important considerations have been overlooked. We have outlined our concerns briefly, below.

Issues:

1. On the subject of disqualifying criminal offenses

(a). The events precipitating disqualification under the rule should not be limited to criminal offenses.

The FAA enjoys substantial prosecutorial discretion and the Agency routinely diverts persons to administrative or civil enforcement actions on the basis of an investigator's opinion of the evidence. This being the case, there are a substantial number of persons who have admitted or been found by an Administrative Law Judge to have committed one or more of the acts listed in the rule, but because a an investigator made no recommendation for a criminal referral, the individuals have not committed a "disqualifying criminal offense." This is unreasonable. While FAA guidelines direct inspectors and others to refer those individuals who show "evidence of willful conduct that could constitute violations of any criminal provisions of the FAAct, the HMT Act, or any other Federal criminal statute," for criminal prosecution, a quick read of the FAA's Hearing Docket makes clear that this policy is applied unevenly. There are a number of issues raised by this situation. However, what is most important to this discussion is the

fact that many of the individuals who are the subject of FAA enforcement actions *not* resulting in criminal referral pose a security risk which is *virtually indistinguishable* from that contemplated by the list of disqualifying offenses. Again, these individuals have admitted to committing or been found by a Law Judge to have committed acts such as interference with flight crew members, carrying a loaded weapon or explosive aboard an aircraft, and unlawful entry into a secure area.

As noted above, FAA policy is to refer individuals for criminal prosecution in those cases where evidence of a violation of Federal criminal law exists. However, the Agency's guidelines tend to undermine this position. Consider, for instance, a passenger who boards a commercial aircraft while having a loaded firearm in his possession. He has already managed to get the gun through airport security and it will be accessible to him during the entire flight. What's more, upon investigating, the FAA finds that "aggravating circumstances" exist. These aggravating circumstances enhance the penalty that is applied in the case. FAA Order 2150.3A CHG 21 recommends that the sanction as to this individual should be $2,500 to $7,500 and the individual should not be referred for criminal prosecution. Compare this guidance to the Federal criminal law which applies. 49 USC Sec. 46505 states that an individual "when on, or attempting to get on, an aircraft in, or intended for operation in, air transportation or intrastate air transportation, has on or about the individual or the property of the individual a concealed dangerous weapon that is or would be accessible to the individual in flight," has committed a crime punishable by fine, imprisonment for ten years, or both. Although it may be the case that the FAA Counsel's decision not to refer the case for criminal prosecution was the right one, we are still left with an individual who brought a loaded gun onto an aircraft. Arguably, this person should not have unescorted access to the SIDA. The same can be said for those who assault a crew member, disable a smoke detector, run through a security checkpoint to retrieve a camera bag, light a cigarette on an aircraft, or get drunk and violent on an aircraft. All of these offenses have largely been handled by way of civil penalty but arguably rise to the level of disqualifying offense. What's more, other false-statement offenses should be included as disqualifying. These offenses should also be considered regardless of whether prosecution occurred in an administrative, civil, or criminal venue. Specifically, 14 CFR 67.403-related offenses relating to falsification , alteration, and incorrect statements on applications, certificates, logbooks, reports, and records should be considered.,

(b). The Administrator has the ability to include non-criminal acts in the list of disqualifying offenses.

The FAA's section-by-section analysis of the rule points out that "The statute provides that the Administrator may make any other felony a disqualifying crime if she determines that the crime indicates a propensity for placing contraband aboard an aircraft in return for money…If the Administrator determines that an additional crime should be disqualifying, these rules will be amended to so provide." This statement is correct, but, we believe, incomplete. If our understanding of the ASIA 2000 amendment to 49 USC 44936(b) is correct, the addition of the above language did not disturb the provision in 44936(b)(2) which gives the Administrator the power to "specify other factors that are sufficient to prohibit the employment of an individual in a position described in subsection (a)(1) of this section." We believe that the language in (b)(2) gives the Administrator the power to extend the list of disqualifying offenses to include those acts which, although having the same subject matter as the currently listed offenses, were prosecuted as administrative or civil actions by the FAA. Of course, only those offenses to which an individual admits or is found by an Administrative Law Judge to have committed should be disqualifying.

(c). The US Code citations following the first 12 items and item 27 on the list of disqualifying offenses should be removed or annotated to indicate that a Federal prosecution under the given Section is not a prerequisite.

Items one through 12 and item 27 on the list of disqualifying criminal offenses all carry a citation to the US Code Section which applies. If this citation is meant only to illustrate the offense and the Rule carries no requirement that an individual be prosecuted under that Code Section in order to be disqualified, then the citation should state that fact explicitly. If the citation is actually meant to limit disqualifying offenses to violations of the cited section, it may seriously limit the effectiveness of the Rule. This is the case because there may be offenses which are analogous to the offenses listed in the referenced items but that: 1) are not prosecuted under the US Code Section indicated; and, 2) do not easily fit into items 15 through 26. Unless there is an overriding concern which mandates citing the Code Section, we suggest that it would be prudent to avoid listing that section with the particular item.

(d). An additional offense should be added to the disqualifying list. The list should explicitly make violations related to the process described within this Rule disqualifying offenses. A register of applicants must be maintained as well.

While the Rule requires that an applicant certify that the information provided by the applicant under this Rule is "true, complete, and correct" and provides that a false statement is punishable under 18 USC 1001, it appears that a disqualification on the basis of such an offense would have to be made under 26(v), a felony involving "Dishonesty, fraud, or misrepresentation." This is not adequate. For one thing it will require that dishonesty, fraud, or misrepresentation be shown—a short list of descriptors that may or may not fit the act in question. More importantly, disqualification on the basis of making a false statement on the application can only be supported under the Rule if a felony conviction results. As is the case with the Part 67 falsification offenses, a successful administrative or civil enforcement action should be sufficient to show that the individual in question should be disqualified. This is especially true given the fact that the FAA is unlikely to initiate criminal prosecution in every case in which an applicant makes a false statement on the application. Apparently, applicants that make false statements on the application but are not criminally prosecuted are free to reapply. This is an ineffective deterrent. We also believe that the penalty for failing to report a conviction for a disqualifying offense should not be limited to simply the withdrawal of unescorted access privileges. If that is the case, there is obviously no incentive to report conviction for a disqualifying offense. Rather, the incentive is in maintaining continued employment until such a time as the employer discovers the offense.

The same concept should apply in the case of an individual who makes multiple attempts to successfully pass the CHRC. Knowing that the AFIS hit rate varies with such factors as the quality of the print, an individual who is rejected on the basis of the CHRC done by one employer may well apply with a second or third employer, knowing that there was a chance that one of the ten-print images may be different enough from the prints on file that no match is made. For this reason we recommend an additional question on the application asking for a history of applications made under the Rule. Further, we strongly believe that a register of applicants be maintained and each new applicant checked against that register to determine: 1) whether the applicant has truthfully reported his or her application history; and, 2) whether an individual is exploring the accuracy of the system. In the latter case, that individual may be attempting to gain unescorted SIDA access for himself, or simply looking for security holes in the system. In any case, a register of applicants must be maintained.

2. On the subject of the CHRC Rule, generally

(a). Do not submit fingerprints directly to the FBI. Rather, fingerprints should be submitted through state criminal history repositories.

While direct submission of noncriminal justice fingerprints to the FBI is the method traditionally preferred by the Federal government, it is not the most effective manner of conducting criminal history record checks. Rather, the most efficient method of conducing these checks it to submit fingerprints to the state criminal history repository in the state in which the subject resides. Simply put, the FBI database does not reflect or have access to all of the records in all state criminal history record repositories. Although the FBI does have Federal records, and the system is set up with the intent of being able to identify all state felons through the FBI system, such utility is not yet in place. Until such a time as that utility *does* exist, fingerprints should be submitted to state repositories first. Only in the event that the state repository cannot identify the subject will the tenprint be forwarded to the FBI. As structured in the rule, the CHRC is going to miss some individuals that would have been identified had the prints been submitted to the appropriate state repository first. While invoking the name of the FBI makes the Rule's approach more publicly palatable, direct submission to the FBI results in less information, not more. This mandate is focused on style, not substance, and will provide fodder for those who constantly attack the FAA on the basis of the Agency's "feel good" rulemaking. This is unfortunate.

(b). A Subsequent Arrest Notification Service (SANS) should be implemented. This type of system normally relies upon the ability and willingness of a state criminal history repository to notify the Agency should an employee with unescorted access be arrested for a disqualifying offense. However, in the absence of state support, the Agency should consider requiring regular, automated, resubmission of applicants' fingerprints. This may be done on a regular or random basis. This concept does not take the place of a requirement for regular re-application. Rather, a random resubmission should be seen as a quality control tool.

(c). Ensure that when fingerprints are submitted under this Rule that the FBI retains the record. Do not support an approach which allows the FBI to check the submitted fingerprints against the database and then destroy the fingerprints.

(d). We agree with the Air Transport Association's position that the FAA should require airport operators to accept certifications by airlines regarding their employees as to past CHRC unless an airport can articulate a particularized concern on an individual basis for not accepting the airline-employer's certification.

If *no* airport will accept a given airline's CHRC certification, then there is no reason for an airline to conduct CHRC on their own employees, for none of their employees could get unescorted access to a SIDA without the airport conducting the CHRC. This result is absurd. Airport security at airports with commercial service exists primarily to support the safe and secure operation of aircraft and the passengers and crew aboard them. To refuse to accept an airline-employer's CHRC certification argues that the airport should be in the position of protecting the airline from that airline's employees. What's more, refusal to accept an airline-employer's certification would seem to indicate that an airport finds fault with the airline's application processing or other aspect of the process. If it is the case that air carriers are doing a poor job of processing their employees, the airport must approach the FAA with this information. However, if the airport believes that the airline's certification process is thorough and correct, there should be no reason to require an additional check. Of course, the motivation may have nothing to do with the CHRC itself. It may be that airport authorities recognize that there is no practical way for an

airline to secure unescorted access at every airport it services for every employee with a need for that access if the airline's employees are required to submit to a separate CHRC at every location. In such a case, airlines may be forced to move crew rooms and other crew-related operations facilities out of the SIDA and into the terminal. This frees up valuable space in the SIDA that the airport authority may use for more profitable endeavors. As a matter of fact, this seems to be happening already in some locations.

(e). We disagree with the ATA on the issue of the 45 day revocation period regarding lack of disposition on disqualifying offenses and agree with the position of the Washington Dulles International and Ronald Regan Washington National Airports.

Unescorted access authority must be immediately suspended for individuals whose CHRC discloses an arrest for a disqualifying offense without indicating a disposition. The 45 day period is, from a security standpoint, far too long. What's more, based upon the reporting of criminal justice repositories, it is probably not long enough to accommodate the actual amount of time it takes to record a disposition. In any event, allowing an employee unescorted access for any period of time while awaiting word on disposition is unreasonable. Obviously, there will be some arrests that become disqualifying offenses and some which are dismissed, thereby not becoming a disqualifying offense. Allowing an employee unescorted access in the interim does not take seriously the concerns behind this Rule, for it would allow an employee access one day, and, upon the arrest maturing into a disqualifying offense, treat that employee like a terrorist the next day. Finally, we note that the Rule requires that the individual must disclose a *conviction* for a disqualifying offense within 24 hours and surrender the SIDA access medium. However, there does not appear to be an ongoing requirement to report an *arrest* for a disqualifying offense until final disposition. On the other hand, a CHRC that *discloses* an arrest for a disqualifying offense without indicating a disposition starts the 45 day clock running on suspension. These two approaches appear inconsistent.

(f). The Rule lacks due process consideration. This is a fundamental issue which simply must be addressed explicitly.

Thank you again for the opportunity to comment.

Sincerely,

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